

Insight

Dispute Resolution

Significant new developments in English bribery and anti-corruption law

The ground under which UK companies conduct business here and abroad is shifting. Today's release by the Law Commission of its much-awaited report *Reforming Bribery*; recent remarks by the new director of the Serious Fraud Office ("SFO") Richard Alderman, indicating the new direction of SFO enforcement efforts; and the SFO's recent ground-breaking settlement with Balfour Beatty plc regarding unlawful accounting practices mark a sea change in English anti-corruption law and practice.

Whilst questions remain as to whether these developments signal a shift towards a more hard-line, US-style approach to enforcement, UK companies are wise to take note now of the additional responsibilities being imposed on corporate directors.

The Law Commission Report

The Law Commission report *Reforming Bribery* released today sets out recommendations and a new draft Bribery bill to amend English corruption law. The Report introduces four new offences designed to replace the existing (and much maligned) regime, consisting of the common law offence of bribery, and the 1889, 1906 and 1916 Prevention of Corruption Acts.

The recommended new bribery offences are:

- 1) the general offence of paying a bribe;
- 2) the general offence of receiving a bribe;
- 3) the specific offence of bribing a foreign official; and

- 4) the corporate offence of negligently failing to prevent bribery by an employee or agent.

Notable recommendations include:

- Removal of the distinction between public and private sectors that currently divides bribery offences as defined in existing law. For the first time, actors in both public and private law spheres will be subject to the same set of offences.
- Extension of bribery law to cover foreign nationals who live and conduct business in the UK. Under existing law, English courts lack jurisdiction over foreign nationals who commit bribery offences abroad.
- Concise definition of "bribe" and other key terms. The Commission highlights the often conflicting and contradictory terms currently in use and recommends clear and consistent definitions for the most important legal terms.



Our White Collar Group

An important trend in regulatory enforcement is the rapidly increasing cooperation among national and multinational authorities. Regulators often pursue investigations simultaneously across multiple jurisdictions requiring companies to marshal national and transnational responses.

Our white collar group advises companies, financial institutions, and senior business and political figures on both domestic and international civil and criminal investigations and enforcement proceedings.

White & Case has extensive experience in all stages of regulatory investigations and litigation. With our substantial global presence, we are uniquely qualified to assist clients to manage their obligations and defend their interests in this new and evolving enforcement environment.

This document is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

The SFO plans to appoint a new Head of Corruption and transfer 100 staff from general areas to establish a new Corruption division.

New direction for the SFO

The Law Commission Report coincides with a shift in the SFO's approach to anti-corruption and bribery enforcement. On 18 November 2008, the SFO Director Mr Alderman, speaking at Butterworth's conference on Anti-Corruption and Bribery, identified corruption as a key focus area for the SFO going forward. The SFO plans to appoint a new Head of Corruption and transfer 100 staff from general areas to establish a new Corruption division. The SFO will also now make use of the range of enforcement tools at its disposal including: an emphasis on self-reporting by corporate directors; non-prosecution remedies, including civil recovery and/or monitoring programmes; up-front asset recovery; director disqualification and reporting to professional bodies; as well as a reduced number of the large-scale investigations and prosecutions that have traditionally marked the SFO's approach to corruption allegations.

Of particular importance to individual corporate directors is the SFO's new emphasis on self-reporting. Mr. Alderman noted that the SFO would accord "the maximum degree of leniency" to those who self-report and cooperate with SFO investigations. For example, following a takeover where historic problems are uncovered, boards will be expected to address the issue head-on and report to the SFO. Failure to do so raises the risk of liability arising from their knowledge of the past corrupt practices, even though they themselves may never have engaged in unlawful conduct.

Balfour Beatty settlement

The SFO's new approach to bribery and corruption enforcement can be seen clearly in the £2.25 million settlement reached last month with the construction firm Balfour Beatty plc. The settlement addressed all potential claims relating to allegations of unlawful accounting practices arising from certain "payment irregularities" that took place during the

construction of the Bibliotheca Project in Alexandria, Egypt in 1996-2001. A Balfour Beatty subsidiary undertook the joint venture project with an Egyptian company. During its own internal investigation, Balfour Beatty plc discovered the irregularities and reported its findings in April 2005 to the SFO and other appropriate authorities.

Although bribery committed abroad did not fall under the jurisdiction of UK courts until 14 February 2002, the SFO found that documentation prepared by the subsidiary relating to the payments did not comply with the requirement that accurate business records be kept in accordance with S221 Companies Act 1985. Balfour Beatty cooperated fully with the investigation and accepted the finding of unlawful conduct. In announcing the settlement, the SFO acknowledged that no criminal prosecution of the company or any individual was warranted and commended Balfour Beatty plc for its "transparent and responsible approach" to reporting the issue.

This marked the first time that the SFO reached a civil settlement as part of a foreign bribery investigation. Only recently did the SFO become empowered to achieve such a result. In April 2008, the Serious Crime Act 2007 transferred civil recovery powers arising under the Proceeds of Crime Act 2002 from the Assets Recovery Agency to a number of specified agencies, including the SFO. These new powers allow the SFO to recover property obtained by unlawful conduct, even in the absence of a finding that the company or individuals involved committed any other offence. As seen in the Balfour settlement, this extends even to situations where the underlying allegation of bribery did not constitute a triable offense under English law.

A shift towards a more hard-line, US-style approach?

Are these developments evidence that the UK is now moving towards a more hard-line, US-style approach to corruption issues? Three observations can be made here. First, the SFO appears ready to follow the approach taken by the U.S. Department of Justice (the "DOJ") in its enforcement of the Federal Corrupt Practices Act ("FCPA"), which relies heavily on whistle-blowers, self-reporting and internal investigations conducted by U.S. companies themselves. This would impose potentially burdensome obligations on UK companies to investigate internal allegations of corruption, including those of subsidiary companies (as with Balfour Beatty), and to take further steps to address and prevent future corrupt practices. US authorities have vigorously prosecuted companies and individual directors who, having failed to self-report, were then found guilty of FCPA violations. Similar risks may exist for UK company directors should they not undertake appropriate internal investigations of corruption or fail to report allegations directly to the SFO.

Second, it seems likely that the SFO will extend a company's investigation and self-reporting responsibility to include historical acts undertaken by the management or directors of a recently acquired company. In his comments at the Butterworth's conference, Mr. Alderman stressed that, in a corporate takeover, individual directors of the acquiring company may be held accountable for their knowledge of the acquired company's past corrupt acts. A board that merely sits on allegations of corrupt practices undertaken by the previous management therefore places itself and its members at risk of SFO prosecution. This mirrors the approach taken by the DOJ in similar circumstances.

Third, the DOJ has recently increased the number of FCPA prosecutions in the U.S. Prosecutions doubled from 2006 to 2007 and the Deputy Chief of the Fraud Section of the DOJ, Mark F. Mendelsohn, recently indicated that this trend is expected to continue as it served a "credible deterrent effect" on future FCPA violations. Whilst the SFO is now empowered to arrive at civil settlements and adopt a variety of non-prosecutorial measures in response to corporate corruption, criminal prosecutions are by no means off the table. Mr. Alderman indicated that in very serious cases, for example where board members themselves are involved in the corrupt practices, large-scale investigations and criminal prosecutions will still be appropriate. The recent increase in prosecutions in the U.S. should serve as a reminder to UK directors that self-reporting alone is insufficient to avoid criminal liability.

Conclusion

These developments in UK law and practice on bribery and corruption mark a significant departure in how UK authorities have previously approached these issues. It is increasingly important that corporate directors investigate and report allegations of corruption within their companies to the appropriate authority. For years American companies have been subjected to increased self-reporting and investigation obligations under the FCPA regime, with risk of significant civil fines and individual criminal responsibility should they fail to comply. It seems likely that the UK anti-corruption authorities are now embarking down a similar road.

We believe this information will be of interest to you. But if you do not wish to receive further similar information about events or legal issues from White & Case, then please e-mail unsubscribe@whitecase.com

We're here to help

For more information about this subject, please contact:

Alistair Graham, partner
+44 (0)20 7532 1800
agraham@whitecase.com

Tara Conklin, associate
+44 (0)20 7532 1810
tconklin@whitecase.com

White & Case consists of over 2400 lawyers practising in 36 offices in 24 countries around the world.

© White & Case LLP 2008



White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
T +44 (0)20 7532 1000
F +44 (0)20 7532 1001

www.whitecase.com

ABU DHABI ALMATY ANKARA BANGKOK BEIJING BERLIN BRATISLAVA BRUSSELS BUCHAREST BUDAPEST DRESDEN DÜSSELDORF
FRANKFURT HAMBURG HELSINKI HONG KONG ISTANBUL JOHANNESBURG LONDON LOS ANGELES MEXICO CITY MIAMI MOSCOW MUNICH
NEW YORK PALO ALTO PARIS PRAGUE RIYADH SÃO PAULO SHANGHAI SINGAPORE STOCKHOLM TOKYO WARSAW WASHINGTON, DC

1108079

Worldwide. For Our Clients.